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THE LAW SCHOOL. — The registration in the School for the last twelve years is shown in the following table:

	1907–08	1908–09	1909–10	1910–11	1911–12	1912–13
Res. Grad. . .	2	—	—	2	3	6
Third year . .	171	169	187	178	219	176
Second year .	198	207	191	238	217	186
First year . .	280	244	311	296	289	287
Unclassified .	—	—	—	82	76	84
Specials . . .	63	64	70	3	4	5
	714	684	759	799	808	744

	1913–14	1914–15	1915–16	1916–17	1917–18	1918–19
Res. Grad. . .	4	5	8	10	5	3
Third year . .	169	167	177	213	73	37
Second year .	197	197	226	234	87	24
First year . .	260	288	308	335	96	36
Unclassified .	64	68	66	64	31	13
Specials . . .	1	5	1	2	0	1
	695	730	786	858	292	114

NATURALIZATION OF ALIENS. — As Professor Valery has pointed out,[1] one effect of the war is quite certain to be a heightened interest in the question of each individual's nationality. Incidentally, it is worthy of note that the existence of war and the passage of certain legislation relating to it have raised old questions concerning naturalization in a rather novel way.

Naturalization of an alien in the United States involves two legal acts. First, the express and absolute renunciation by the applicant of his old

[1] 31 HARV. L. REV. 986–87.

allegiance. Second, his assumption of the new allegiance and this country's acceptance of him as a citizen.[2]

The proper performance of the first act necessarily involves a decision in favor of the applicant's right to expatriate himself, for the United States has never tolerated the notion that a naturalized citizen may retain even a shred of fealty to his former sovereign.[3] Now foreign countries have generally been unwilling to relinquish their subjects or citizens. At one time or another, practically every European nation has denied or clogged expatriation.[4] England, clinging to the feudal law, proclaimed and enforced until 1870 the doctrine of indelible allegiance.[5] The German States and Austria seem always to have asserted the power to retain their nationals. With them, as with other countries having enforced military service, such power has usually been manifested in the cases of men of military age, who are likely to be the most valuable emigrants.

The United States has had collision after collision with foreign powers over this matter. But its own attitude has not been free from uncertainty. There were, and possibly still are, sharp differences of opinion between the three branches of the government. The judiciary, following common-law precedent, early embraced indelible allegiance.[6] The executive, represented by the Department of State, pursued a wavering policy until 1859.[7] Since then it has quite consistently championed an unlimited or at least a very broad right of expatriation. It may fairly be argued that Congress, by passing naturalization acts which paid no attention to restrictions advanced by other countries, early implied its

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[2] See the form of petition and oath. Act of June 29, 1906, 34 STAT. AT L., pt. I, 596, § 4, subdivisions First, Second, and Third.

[3] It might be argued that the subject could relinquish the sovereign without the sovereign's relinquishing the subject. This seems unworthy hair-splitting. Besides, it would permit the discarded sovereign to enforce unwilling obedience from the expatriate, if jurisdiction over the latter could be obtained. But our laws require the protection of naturalized citizens, even when abroad, as fully as if they were native born. U. S. REV. STAT., § 2000, Act July 27, 1868, c. 249, § 2, 15 STAT. 224; 14 Opinions Attorneys General, 298–99 (1873); H. R., Doc. 326, 59th Cong., 2d Session, 25; *In re* Haas, 242 Fed. 739, 740 (1917).

The British, however, under the Naturalization Act of 1870 conceded that their adopted subjects should not be deemed Britishers when within the limits of the foreign states of which they were subjects previously to obtaining their certificates of naturalization, unless they had ceased to be subjects of such states in pursuance of municipal law or treaty. *In re* Bourgoise, L. R. 41 Ch. D. 310 (1889). The Act of 4 & 5 Geo. V, c. 17, pt. II, § 3 (August 7, 1914), has revoked this concession.

[4] An outline of the state of law about 1869 is given by COCKBURN ON NATIONALITY, 50 *et seq.* The House Document referred to in the first paragraph of note 3 outlines the situation as of about 1906. This House Document is a mine of information, rather poorly arranged.

A sharp distinction must be drawn between laws which merely penalize illegal emigration or expatriation, and those which refuse to recognize expatriation without consent. COCKBURN, *supra*, 55, 134.

[5] COCKBURN, *supra*, 63–64. The allegiance is not really "indelible" and never was. The author admits that Parliament could have wiped it out. This doctrine of Great Britain's was one cause of the War of 1812. COCKBURN, *supra*, 70.

[6] Shanks *v.* Dupont, 3 Pet. (U. S.) 242 (1830). See, for a more discreet modern view under the statute, Mackenzie *v.* Hare, 239 U. S. 308 (1915).

[7] TAYLOR ON INTERNATIONAL PUBLIC LAW (1901), § 183. This is a good summary which can easily be elaborated by reference to the sources given.

belief in an unrestricted right to shake off foreign sovereignty.[8] Whatever doubt existed as to the legislative view in the middle of the nineteenth century was dispelled by the Act of July 27, 1868.[9] This somewhat flamboyant statute declares expatriation to be "a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness"; it further asserts that "any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions" the right, is "inconsistent with the fundamental principles of the Republic."

This act was sufficient to settle United States municipal law for the time being, but of course it could not of itself affect foreign municipal law. At this very time, however, the series of reciprocal naturalization agreements known as the Bancroft treaties was being negotiated.[10] It might be argued that this negotiation *per se* was a surrender of free expatriation, the more so as the treaties impose substantial conditions upon the exercise of the right. It seems fairer, though, to deem them discreet concessions to convenience. In diplomacy, half a loaf is far better than no bread at all. The United States has not been successful in making such conventions with all nations, France, Italy, Serbia, Turkey, and numerous others remaining outside the fold. By its own municipal law, Great Britain has adopted an extremely liberal policy with respect to foreign naturalization of its subjects.[11]

Divorced from the heat and prejudice of the times in which it was passed,[12] the Act of 1868 does not seem an entirely safe star by which to set one's course. The vigorous *caveat* against contesting its utter validity is somewhat repulsive to legal common sense, which prefers logic to bull-dozing. Many of the better writers on public or international law deny flatly and with good reason that there is any such thing as an unrestrictable right of expatriation.[13] To those taking this point of view it is gratifying and significant to find Congress eating some of its own words by passing the Act of March 2, 1907,[14] which in laying down general rules as to what constitutes expatriation declares "That no American citizen shall be allowed to expatriate himself when this country is at war." The prohibition gains a more than municipal significance from the fact that its framers stated it to be "declaratory of a principle of public law which should be placed on the statute books, so that no

[8] VAN DYNE ON NATURALIZATION IN THE UNITED STATES (1907), 333 *et seq.*

[9] Now U. S. REV. STAT., § 1999.

[10] These are conveniently collected in MALLOY'S TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS (1776–1909).

[11] 33 & 34 Vict. c. 14, § 6 (1870). And see 4 & 5 Geo. V, c. 17, pt. III, § 13.

[12] The days of the Fenian uprising. COCKBURN, *supra*, 86 *et seq.*, shows what the English thought of the American attitude. Oddly enough, Cockburn seems not to have known of the Act of 1868, although his book was published in 1869. See his acid comment on page 106.

[13] For example, BORCHARD ON DIPLOMATIC PROTECTION OF CITIZENS ABROAD, § 317, says: ". . . the conclusion is inevitable, both under international and municipal law, that there is no such thing as the inalienable and inherent right of a citizen to expatriate himself." See also Attorney General Cushing's very elaborate opinion, 8 OPINIONS ATTORNEYS GENERAL, 139, 152, 153, and 168 (1856). Compare Professor Valery's remarks in the BULLETIN MENSUEL DE LA SOCIÉTÉ DE LÉGISLATION COMPARÉE, AVRIL–JUIN (1917), 161.

[14] 34 STAT. AT L., pt. I, 1228.

doubt can ever be raised on a point which may be vital to the United States." [15] Sound authority is cited for the proposition, and more might be adduced.[16]

Applying this modification of the Act of 1868 to a supposititious case will indicate the kind of complication which may result from naturalization in war time. During 1915 a German of military age, who has resided in the United States for more than five years but who has no discharge from his nationality of birth, applies for and receives his final naturalization papers. It may be assumed that he gets them as a matter of course, for there appears to be nothing questionable about the man and nothing unusual about the case. But if the judge had examined the new German Imperial and State Law of Nationality [17] he would have found that while a discharge from nationality "may not be refused *in time of peace*" except for certain specified reasons, "In time of war and danger of war the right is reserved to the Emperor to issue special regulations." Looking further, he would have discovered that on August 3, 1914, the Emperor did issue a special regulation to the effect that persons under obligation to serve in the army were not to be discharged from either State or direct Imperial allegiance until further notice.[18]

This puts our hypothetical naturalized citizen in an uncomfortable position. To take the least likely and perhaps the least hurtful possibility first, an active United States attorney may endeavor to have his certificate canceled.[19] The attorney would argue that the Act of 1907 read into our *corpus juris* and specifically into the naturalization act of the preceding year the "principle of public law" which forbids the desertion of one's country *flagrante bello* and that the German applicant obtained his papers fraudulently or illegally. If the attorney felt unkindly toward the respondent, he would point out to the court how unlikely it is that a German would disregard the law of his Fatherland; and he would suggest that possibly this German saved his skin by taking advantage of that wicked provision of the Delbrück Law which enabled him to retain his original nationality.[20] Numerous defenses to such a proceeding may

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[15] H. R., Doc. 326, 59th Cong., 2d Session, 28. The opinions of the Secretary of the Treasury and the Secretary of State referred to therein may be found in 2 Foreign Relations (1873), 1187 and 1204.

[16] See note 13; also HALLECK ON INTERNATIONAL LAW (1908), § 29, 462.

[17] This law is commonly known as the Delbrück Law. "*Vor der Erteilung der Genehmigung ist der d. Konsul zu hören,*" REICHS-GESETZBLATT (1913), 583, 589, quoted *In re* Haas, 242 Fed. 739 (1917). The translation quoted is that presented in 1914 to both Houses of Parliament.

[18] REICHS-GESETZBLATT (1914), 323. To avoid any chance of faulty translation, the original text is quoted: "*Wehrpflichtige sind bis auf weiteres nicht aus der Staatsangehörigkeit oder unmittelbaren Reichsangehörigkeit zu entlassen.*"

[19] In accordance with § 15 of the Naturalization Act of June 29, 1906, 34 STAT. 601.

[20] Paragraph second of § 25: "A person does not lose his nationality if, before acquiring a foreign nationality, he has applied for, and received, the written permission of the competent authorities of his home state to retain his nationality. Before the grant of such permission, the German consul is to be consulted." (*Die Staatsangehörigkeit verliert nicht, wer vor dem Erwerbe der ausländischen Staatsangehörigkeit auf seinen Antrag die schriftliche Genehmigung der zuständigen Behörde seines Heimatstaats zur Beibehaltung seiner Staatsangehörigkeit erhalten hat. Vor der Erteilung der Genehmigung ist der deutsche Konsul zu hören.*)

be suggested,[21] but it would be an unhappy ordeal and of uncertain outcome.[22]

Probably this attack would not have to be faced if our German behaved himself. But the United States declares war against Germany. He is drafted, goes to France, and is captured in battle; the stone wall and the firing squad may well be his fate. To Germany, under the "principle of public law," he is still a German and emphatically a traitor. He has no clever American lawyer to defend him before the military tribunal. He has not even the cold comfort of expecting to be revenged. How can the United States enter upon reprisals for an act which it would have done itself had the situation been reversed?

Or, to close the question with a less painful although serious possibility, imagine that our friend returns to Germany for a visit after peace is declared. Will he not taste of durance vile? And, again, can the United States effectively protest the application of its own "principle of public law" which was indeed "vital to the interests of Germany"?

It is now appropriate to turn from the first element of naturalization and consider briefly that aspect of the second which deals with the acceptance of the applicant by the new sovereign of his choice. When war was declared against Germany in April of 1917 alien enemies, and indeed every alien who was a "native citizen or subject, or a denizen" of the German Empire,[23] automatically became barred from naturalization. In December of the same year Austro-Hungarians were likewise barred. But on May 9, 1918, the naturalization law was radically amended.[24]

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[21] As, for instance, that the United States naturalizes in entire disregard of foreign law, as it certainly has a right to do; that the Bancroft treaties cover the case, and § 36 of the Delbrück Law continues treaties in effect; that one needs no "discharge" to lose Germanic nationality by foreign naturalization, the questions of discharges and naturalization abroad being treated in entirely different sections of the Delbrück Law.

[22] It may be remarked that the powers arrayed against Germany, and even neutral nations, would probably have treated our friend as still a German. During the war between France and England at the end of the eighteenth century a Frenchman emigrated to the United States and became naturalized. While the war was still on, he shipped a cargo to some foreign port, warranting the goods neutral. The British captured and condemned them as belligerent. *Held*, that he cannot recover the insurance because there was a breach of warranty. The covenant of neutrality was drawn in contemplation of international law and it is a rule of international law that a man may not expatriate himself *flagrante bello*. Duguet *v.* Rhinelander, 1 Johns. Cas. (N. Y.) 360 (1800); Jackson *v.* New York Insurance Co., 2 Johns. Cas. 191 (1801) acc. The former case was reversed and the latter overruled by a divided court. 2 Johns. Cas. 476; 1 Caines Cas. XXV gives the majority opinion only. The reasoning which ruled the upper court is not very persuasive. It appears to have been disapproved by contemporary jurists. 1 KENT COM., 3 ed., 76 (star paging); 1 PHILLIPS ON INSURANCE, 5 ed., § 166; 1 DUER ON INSURANCE, 521; 1 ARNOULD ON MARINE INS., 9 ed., § 95. The lower court's rule seems also to be accepted by The Dos Hermanos, 2 Wheat. 98 (U. S.) (1817).

[23] U. S. REV. STAT., § 2171, Act April 14, 1802, c. 28, § 1, 2 Stat. 153. There seems to be a mistake in the punctuation of the first dozen words. The new act referred to in note 24 cured this mistake. "Alien enemy" may not sound rhetorically correct, but in our statute law it is a phrase of art and just now is particularly dear to those engaged in counter espionage activities. U. S. REV. STAT., § 4067; Act July 6, 1798, c. 66, § 1, 1 Stat. 577. The definition of the term was extended to women by an amendatory act of Congress, and the President by proclamation put this act into effective operation. The act is dated April 16, 1918, the proclamation, April 19, 1918.

[24] By Pub. No. 144, 65th Cong., H. R. 3132. The amendatory act is frequently referred to as "The Raker Act."

Two portions of the amendment, being its subdivisions numbered seventh and eleventh, are of interest. The latter provides that no alien enemy may become a citizen unless he can conform to certain conditions with respect to the date of his declaration of intention, etc.; or, failing that, unless the President by an act of special grace "upon investigation and report by the Department of Justice fully establishing the loyalty" of the applicant, excepts him from the classification of an alien enemy. From a purely practical, non-legal standpoint these are most remarkable provisions. The other opponents of the Central Powers have bent every effort toward squeezing Germans and Austro-Hungarians *out of* citizenship rather than toward admitting them *into* citizenship. Certain considerations of policy, particularly concerning the subject races of Austria-Hungary, may well overbalance this consideration and also the apparent inadvisability of casting the labor of thousands of new investigations upon a Department already bearing the brunt of the war work.

When one turns to the legal points, however, difficulties multiply. If a native of Germany naturalized here when the country was neutral might reasonably expect harsh treatment from his former compatriots, he will surely be doubly damned if he attempts to become an American while war is on between the two nations. Should he be captured in military operations, his fate is certain unless considerations of policy stay the execution. There is a British case squarely in point.[25] One would not expect more mercy of the Hun.

Subdivision seventh of the amendatory act is an overwhelmingly complex and ill-drawn paragraph dealing with everything from a Filipino to an alien seaman, but especially providing for the expeditious naturalization during the war of aliens in the military and naval service. This object is thoroughly laudable and it is a pleasure to know that a land-office naturalization business was done in the army camps.[26] The trouble is that a very substantial number of alien enemies have been admitted under this section. It was believed that their admission would save them from treatment as traitors if captured, a risk which they naturally did not care to face. The foregoing discussion leads to the conclusion that such a belief is thoroughly unsound. The grim possibilities of the mistake, if it is one, are obvious. Fortunately they appear not to have been realized in fact. But there is another difficulty. Subdivision seventh purports to cover "any alien serving in the military or naval service." It must be remembered, however, that for over a century the naturalization of alien enemies has been forbidden and that this restriction is continued with certain specified relaxations by a subsequent subdivision of this very act. It appears not unlikely that Germans and Austro-Hungarians dealt with under subdivision seventh have ac-

[25] Rex *v.* Lynch, 1 K. B. (1903) 444. The court simply slashed its way through an absolutely unqualified expatriation statute, saying that naturalization itself under the circumstances was an act of treason. During the War of 1812 the same point came up, and executions of captives were avoided by a hair's breadth. COCKBURN, *supra*, 70.

[26] On the other hand, there appear to have been few if any naturalizations under subdivision eleventh as late as November 1, 1918.

quired naturalization which is a "scrap of paper" here, just as it is in their native countries.[27]

The reader will have remarked that all the lines of this brief discussion converge on a common point. Even if the arguments advanced above are mistaken and can be successfully rebutted, it appears that the United States has, since the commencement of the war in 1914, received or purported to receive as citizens numbers of foreign born individuals whose status is somewhat doubtful here and decidedly doubtful abroad. If we grant that the nations cobelligerent with us are likely in courtesy and good feeling to waive any rights concerning their nationals, our opponents still remain to be considered. Embarrassment amounting to a dilemma is clearly possible. It is hard to see how we can refuse to protect even in Germany a German native naturalized here between August 3, 1914, and the end of the war. Our own statute law requires the executive to tender such protection.[28] Yet if we do so, we shall be denying Germany a right which the United States has recognized and asserted for itself. To put the point in another way, no persons have exceeded Americans in denunciation of those provisions of the Delbrück Law which encourage the conscious creation of dual allegiance. Can we continue this denunciation with much justice if our courts and our Congress have been making decisions and passing laws which tend toward precisely the same end?[29] JOHN M. MAGUIRE.

THE THEORY OF THE PLEADINGS. — It might be thought that if a defendant has had ample notice of the claim against him and an opportunity to defend, and the facts have been fully presented on both sides, and a judgment has finally been recovered against him, he ought to pay. Even more clearly it would seem that when the defendant in his answer has expressly admitted a right of action in the plaintiff, the plaintiff should be entitled to recover on that right of action. In New York according to a recent decision of the Court of Appeals this is not the case. One Jackson brought suit against one Strong alleging that they had entered into a contract to prosecute an undertaking for their joint benefit, sharing equally as partners in the expenses and in the receipts; and the plaintiff asked for an accounting and for a recovery of the amount due. The defendant denied the agreement to share equally but alleged that he had agreed to employ the plaintiff as his assistant and to pay him the reasonable value of his services. The case was tried before a referee who reported that there was no agreement to share but that the defendant had agreed to pay the plaintiff the reasonable value of his services. Judgment was given for the plaintiff for the reasonable value of his services. After several years the Court of Appeals has at length decided that the judgment should be reversed.[1] And why? Not because the

[27] If this doubt turns out to be really substantial, the air should be cleared by a remedial act.

[28] U. S. REV. STAT., § 2000.

[29] The whole tangled situation should be straightened out by explicit provisions of the final treaty of peace. Otherwise we have stored up squabbles for the next fifty years.

[1] Jackson *v.* Strong, 222 N. Y. 149. See RECENT CASES, page 179.